The People &c., Respondent, v. Clive Spencer, Appellant.

No. 229

COURT OF APPEALS OF NEW YORK

Jay H. Schwitzman, for appellant.
Roseann B. MacKechnie, for respondent.

OPINION:
CIPARICK, J.:

The question presented is whether the police may stop a moving vehicle in order to request information of the driver concerning the whereabouts of a criminal suspect. We conclude that the stop in this case was an unreasonable seizure within the meaning of the Fourth Amendment.

I

On May 17, 1989, police officers Edward Alonge and Donald Conceicao were on routine patrol in a marked radio car when they received a radio report that a woman had been assaulted with a gun by her boyfriend the previous day. At 11:20 p.m., the officers picked up the complainant and, with her in the car, drove around the neighborhood searching for the suspect. According to the testimony of officer Alonge, they drove around for "No more than four or five minutes" before the complainant saw defendant seated behind the wheel of a double-parked car and stated that he was a friend of her boyfriend's and that the latter might be nearby. At this time, defendant's vehicle began moving. The officers followed defendant and pulled him over using their turret lights and car horn. Defendant halted his vehicle on the next block and both officers approached the car carrying lighted flashlights. As the officers drew near they observed a female passenger. Upon shining their flashlights into the interior of the vehicle, the officers observed at the passenger's feet a clear plastic bag containing green vegetable matter which they

believed to be marijuana. The officers asked defendant and his passenger to exit the vehicle.

While defendant was outside the vehicle, officer Alonge observed the butt of a revolver protruding from underneath the driver's seat on the floor of the car. The officers determined that the gun was loaded and placed defendant under arrest. They permitted the passenger to leave the scene after defendant asserted she had nothing to do with the alleged marijuana. Defendant was charged with criminal possession of a weapon in the third degree and criminal possession of marijuana in the fourth degree.

Defendant moved to suppress the physical evidence on the ground that its seizure violated his constitutional rights. The suppression court denied defendant's motion, finding that the police officers in this case had a right to request information of defendant and could stop his car in order to effectuate that right. The court stated: "at the time the police resolved to exercise their right to request information, defendant's vehicle was in motion. Under these circumstances, common sense demands that they be permitted to stop it."

The Appellate Division affirmed, holding that the police acted reasonably in stopping a defendant's car to request information concerning a suspect's whereabouts. The court relied principally on *People v John BB. (56 NY2d 482* cert denied *459 U.S. 1010),* in which we held that an automobile stop made pursuant to a uniform, nonarbitrary, roving roadblock was constitutionally permissible.

On this appeal, defendant argues that the Appellate Division erred in holding that the police could validly stop his vehicle in order to request information of him. We agree and therefore reverse.

II

Although the right to stop a vehicle is generally analogous to the right to stop a pedestrian, police/motorist encounters must be distinguished from police/pedestrian encounters when the police are operating on less than reasonable suspicion. This is because "the obvious impact of stopping the progress of an automobile is more intrusive than the minimal intrusion in stopping a pedestrian" and constitutes "at least a limited seizure subject to constitutional limitations" *(People v John BB., 56 NY2d 482, 487),* whereas the common-law right of inquiry -- much less the right to request information -- does not include the right to unlawfully seize (*see People v Sobotker, 43 NY2d 559, 563; People v Ingle, 36 NY2d 413, 418).*

We have stated, time and again, that the stop of an automobile is a seizure implicating constitutional limitations *(People v May, 81 NY2d 725; Sobotker, 43 NY2d 559,* supra; *Ingle, 36 NY2d 413,* supra; *see Delaware v Prouse, 440 U.S. 648, 653* ["stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention brief"]). Contrary to the urging of the dissent that we allow preventative "informational stops" so long as some articulable basis exists for that interference, police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime (*see People v Harrison, 57 NY2d 470, 476* [an automobile stop is "a limited seizure of the person which at least requires reasonable suspicion"]; *Sobotker, 43 NY2d, at 563; Ingle, 36 NY2d, at 417-420).*

We reaffirmed these principles recently in *People v May (81 NY2d 725),* where the defendant and a female companion

were sitting in a parked car on a deserted street known for criminal activity. When two police officers in a patrol car approached with red turret lights and a spotlight, defendant started his car and slowly pulled away. Defendant was ordered to pull over. We held that the police officers' premise for that order -- the common-law right of inquiry -- did not satisfy Fourth Amendment standards: "the stop was proper only if the officers had a reasonable suspicion of criminal activity" *(id. at 727)*.

Of course, nothing prevented the police in May from making a common-law inquiry of the individuals in the vehicle while they were still parked, based on the second level "founded suspicion that criminal activity is afoot", which permits interference "with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure" *(People v De Bour, 40 NY2d 210, at 223)*. But we have made clear that the right to stop a moving vehicle is distinct from the right to approach the occupants of a parked vehicle (*see Harrison, 57 NY2d 470* [police needed only articulable basis to approach parked car and request information but, absent reasonable suspicion, officers could not forcibly detain or constructively stop defendants by ordering them to remain in car]). Thus, once the defendant in May indicated his unwillingness to speak to the officers by pulling away, they should not have forced him to stop absent a reasonable suspicion of criminal activity *(May, 81 NY2d, at 728)*. "Any other rule", we stated, "would permit police seizures solely if circumstances existed presenting a potential for danger" *(id.)*.

Clearly, as in cases involving the forcible detention of pedestrians, the instant stop of defendant was a seizure. At the moment defendant was pulled over the encounter lost the consensual characteristics which mark permissible first level intrusions under the *De Bour* four-part test (see *People v De Bour, 40 NY2d 210)*. The question we must address in this case is whether that seizure was reasonable.

III

The reasonableness of a seizure must be judged "by balancing its intrusion on the Fourth Amendment interests of the individual involved against its promotion of legitimate governmental interests" *(People v Scott, 63 NY2d 518, 525; People v John BB., supra; Delaware v Prouse, supra)*. Important factors in that balancing analysis are the effectiveness of the procedure in relation to the governmental interest to be promoted, and "the degree of intrusion of the procedure on the individual subjected to it, measured in terms of both its subjective effect and the degree of discretion vested in the officials charged with carrying it out" (*Scott, 63 NY2d, at 525, supra*).

Applying this balancing analysis to the instant case, we conclude that the nature and degree of the police intrusion outweighed the governmental interest at issue. It is not enough, contrary to the dissent's view, that articulable governmental interests supported the stop. While the nature and degree of the governmental interest at issue here -- investigation and detection of past criminal conduct -- is undoubtedly significant, it does not implicate the same important social objectives that are at issue when police are investigating recent or ongoing suspected criminal activity (*see United States v Hensley, 469 U.S. 221, 228)*.

In *United States v Hensley (469 U.S. 221)*, the Supreme Court upheld the *Terry* stop of an individual based on a "wanted flyer" indicating that the defendant was a suspect in a past robbery. Nevertheless, the Court addressed the nature of the governmental interest implicated by the investigation of past criminal activity and made an important distinction that is relevant here:

> The factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing

> criminal conduct. This is because the governmental interests and the nature of the intrusions involved in the two situations may differ. As we noted in *Terry*, one general interest present in the context of ongoing or imminent criminal activity is "that of effective crime prevention and detection." * * * A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. Public safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful business than it is by a suspect who is currently in the process of violating the law. Finally, officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop.

Not only is the dissent unwilling to acknowledge that stopping an automobile for the purpose of determining whether its occupants can provide information implicating others in past criminal activity involves a less substantial governmental interest than is at issue when the police are involved in actual crime prevention, it blurs the distinction between current or imminent, and past criminal activity.

The dissent's efforts at injecting urgency of gathering fresh information on the violent felon's then whereabouts and the prevention of further violence (*see*, dissenting opn., at 762) is belied by the record. The record is absolutely devoid of any evidence justifying the inference that the complainant, or anyone else for that matter, was in danger of further harm from the suspect. There is similarly no indication that the complainant had ever been assaulted by the suspect before

this incident. Nor is there any evidence to support the inference that the suspect was "armed and dangerous" 43 hours later.

The circumstances of this case -- including the time lapse between the alleged assault and defendant's stop, and the fact that the officers had not even searched for the suspect at his own home during the intervening 43 hours, when they decided to stop defendant on the premise that he was a possible or even probable source of information regarding the suspect's whereabouts -- clearly do not warrant a "preventative governmental interest in the stop" (*see*, dissenting opn., at 762) and do not render the police activity reasonable under the circumstances.

Beyond the fact that the police were investigating past criminal conduct here, the dissent also fails to appreciate that "the Fourth Amendment does not permit the stopping of potential witnesses to the same extent as those suspected of crimes" (LaFave, Search and Seizure § 9.2[b], at 354 [2d ed]). In *United States v Ward (488 F2d 162)*, FBI agents, using sirens, pulled the defendant over in order to question him privately concerning some federal fugitives. The court held that the seizure, which resulted in the agents' recovering a false selective service registration card from the defendant, was unreasonable:

> First, there was no crime "afoot." The FBI agents did not stop appellant's car in connection with any particular crime, but rather the stop was pursuant to a general criminal investigation that had begun several months before. There was no emergency situation nor any need for immediate action. The FBI was not fearful that the appellant would leave town. The agents never sought an interview with the appellant at either his home or place of business although both could have been arranged. In short,

> there were no exigent circumstances warranting the extreme nature of a vehicular stop by a siren on a public street.
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> Finally, and most significantly, the stop was not made pursuant to the agent's founded suspicion that the *detainee* was involved or about to be involved in criminal activity. Rather, the stop was made for the purpose of questioning the appellant about a *third person.* This then was not a ". . . brief stop of a *suspicious individual* [made] in order to determine his identity or to maintain the status quo momentarily . . ." *Adams v Williams, 407 U.S. 143, 146* (emphasis added), for the appellant was not the object of the FBI's suspicions. Clearly, the narrow exception of *Terry v Ohio,* * * * which allows investigative stops on grounds short of probable cause cannot be stretched so far as to allow detentive stops for generalized criminal inquiries

(Ward, 488 F2d, at 169-170).

Crucial to the holding in *Ward,* and here also, is the absence of a crime "afoot." Similarly, there is no indication here that the officers reasonably believed the suspect was about to disappear, thus permitting them to briefly stop defendant in order to "freeze" an ongoing or dangerous situation and acquire more information in contemplation of further action. The record is devoid of any indication that the suspect presented an imminent threat to public safety. Moreover, it should be noted that when defendant was pulled over, the officers had been circling the same neighborhood for only 4 or 5 minutes, obviously expecting to find the suspect in the same vicinity where the complainant had recently observed him; nevertheless, the officers stopped defendant, because, in Officer Alonge's words, "he might possibly know" the suspect's

whereabouts, *even though they had not even looked in the same "Jerk Chicken" restaurant where the complainant had actually and recently spotted the suspect.*

In short, under the circumstances of this case, there was no genuine need for so immediate and intrusive an action as pulling over the defendant's freely moving vehicle. When the government interest in finding and apprehending the suspect in this case is considered in relation to the effectiveness of the procedures chosen to promote it, the intrusiveness of pulling over defendant's freely moving vehicle cannot be justified (*see Scott, 63 NY2d, at 525, supra*). Considered objectively, the law enforcement benefits that would accrue to the government on these facts by stopping an individual vehicle on the ground that its occupants might know the whereabouts of an individual suspected of past criminal activity is marginal. Indeed, less intrusive alternatives could have been employed here.

"The Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on conduct of the individual officers" (*Brown v Texas, 443 U.S. 47, 51; see Scott, 63 NY2d, at 525, supra*). We need not and do not hold today that police officers may never stop a vehicle in order to request information of its occupants. We merely hold that the specific, objective facts of this case did not justify defendant's seizure. The governmental interest at issue in this case must be considered in context. This case involved: the investigation of past criminal activity; the stop of a third person not suspected of criminal activity; the absence of exigent circumstances justifying immediate police action; the availability of less intrusive alternatives; and, the candid testimony of the officers, who considered defendant no more than a possible source of information.

IV

Quite apart from the question of intrusion, the instant seizure is also unreasonable when measured in terms of the degree of discretion vested in the officials charged with carrying it out (*see Scott, 63 NY2d, at 525, supra*). The act of forcibly pulling defendant over resulted from the unchecked discretion of the particular officers involved. It must be kept in mind that this defendant was not the subject of individualized suspicion. In the absence thereof, other safeguards are necessary to ensure that his reasonable expectation of privacy is not subject solely to the discretion of the police. In this case, there were no objective safeguards circumscribing the exercise of police discretion. The stop of defendant was standardless and unconstrained. Nor can we accept the People's urging that the police officers acted in good faith. Subjective good faith, standing alone, is not enough.

Our decision in *People v John BB. (56 NY2d 482, supra),* also involving a suspicionless stop, does not support a contrary result, because other safeguards were present in that case. We held in *John BB.* that the Fourth Amendment does not prohibit the police from employing a roving roadblock in a sparsely populated area beset by burglaries where vehicles are stopped pursuant to a "nonarbitrary, nondiscriminatory and uniform procedure" for the purpose of ascertaining the identity of the occupants and obtaining information concerning criminal activity in the area *(id. at 488).*

There are two crucial distinctions between *John BB.* and the instant case. First, the level of intrusion on the motorists' Fourth Amendment rights in *John BB.* was arguably minimal given that all motorists were being stopped in an impersonal, random manner and no individual vehicle was singled out. The second vital distinction, also arising from the nature of the procedure utilized, was the elimination of "the element of arbitrariness", which we noted had been identified "time and

again as a critical factor in determining the reasonableness of official investigative activity of an intrusive nature" *(id.)*. The nonarbitrary, systematic stopping of vehicles in *John BB.* insured that the procedures employed by the police did not unfold in a manner resting solely upon the officers' discretion.

Unlike *John BB.*, this case evidences a complete lack of objective standards circumscribing the exercise of discretion by the individual officers involved in making the stop. Clearly, *John BB.* was improperly relied upon by the court below.

"The exclusionary rule has as an objective the social benefit of deterring unlawful police conduct" *(People v Wesley, 73 NY2d 351, 354)*. The rule's contours are based in a social policy judgment which "necessarily entails balancing the cost of the loss of probative evidence against the gain in deterring lawless police conduct" *(id. at 355)*. In the circumstances of this case, when the foreseeable deterrent effect against unlawful police conduct is fairly balanced against the adverse impact of suppression upon the truth-finding process, the scale tips decidedly in favor of suppression. If the instant stop were permissible and motorists could in fact be pulled over at an individual police officer's discretion based upon the mere right to request information, a pandora's box of pretextual police stops would be opened.

Finally, we fail to discern the logic underlying the Appellate Division's conclusion that "there is a marked and critical distinction between this case and those in which the person whose vehicle is stopped is the target of the investigative questioning" *(193 AD2d, at 96)*. It would be quite an anomalous rule of law if the free movement of persons who are the targets of investigative questioning could not be interrupted without reasonable suspicion *(see Sobotker, 43 NY2d, at 563-564; Ingle, 36 NY2d, at 418)*, but ostensibly law abiding citizens under no suspicion could be pulled over any time the police had reason to believe they might have information

relevant to a past crime. The Fourth Amendment does not require such convoluted jurisprudence.

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to suppress the physical evidence granted, and the indictment dismissed.

LEVINE, J. (Dissenting):

We respectfully dissent. Patrolling in the course of their investigation of an armed, felonious assault by the victim's estranged boyfriend, the police, accompanied by the victim, encountered defendant in his automobile. The victim assured them defendant would know the perpetrator's immediate whereabouts. The police signaled defendant to stop his moving vehicle in order to obtain that information from him. The police did nothing more than activate their car's turret lights and horn, and then approach defendant on foot without drawing their weapons. The majority condemns this straightforward, restrained response to the direct, immediate information obtained from the victim as an unreasonable seizure in violation of the defendant's rights under the Fourth Amendment. We disagree.

The majority arrives at this result by purporting to apply the balancing test of *People v Scott (63 NY2d 518)* and *People v John BB. (56 NY2d 482, cert denied 459 U.S. 1010)*. Those cases hold that the validity of an informational vehicular stop by the police, such as here, on less than individualized suspicion of criminal activity of an occupant of the vehicle, is dependent on its "reasonableness", to be determined on a case-by-case basis by balancing the particular intrusion on the privacy interests of the individual involved against the State's legitimate interest in the inquiry *(see, People v Scott, supra, at 525; People v John BB., supra, at 487)*.

In finding the police conduct unreasonable here, the majority's balancing analysis, in our view, lacks objectivity. It

denigrates the State's legitimate interest in likely gaining important information from defendant, exaggerates the intrusiveness of the stop on defendant's privacy interest and ignores the findings of the lower courts, supported by evidence in the record, that the police conduct "was not arbitrary [nor] based on mere whim, caprice, or idle curiosity. It was based on information supplied by the victim of the crime who knew the perpetrator, Bloomfield; knew the defendant; knew that the defendant knew Bloomfield, and *believed that the defendant would know where Bloomfield was*" *(193 AD2d 90, 95-96* [emphasis supplied]).

In actuality, there is no balancing by the majority here. Vehicular stops not based on reasonable suspicion of criminal activity of an occupant are strictly limited to (1) "nonpretextual traffic checks to enforce traffic regulations" (majority opn. at 753); (2) the existence of some undefined but apparently extreme or absolute exigency for police action while engaged in prevention of ongoing criminal activity (majority opn. at 754-55); and (3) stops pursuant to a nonarbitrary, nondiscriminatory uniform procedure (majority opn. at 758). A rigid, restrictive code of police conduct has been applied by the majority here, in spite of our holding in *People v John BB.* that "the indefiniteness of the term 'unreasonable' [in the Fourth Amendment] militates against the construction of a general rule of universal application for determining the validity of official intrusions of this nature" *(supra, 56 NY2d, at 487).*

The evidence at the suppression hearing established that the complainant first filed her charge against Dion Bloomfield, her estranged boyfriend, on May 16, 1989, accusing him of striking her in the mouth with a pistol (breaking a tooth) at 4:00 a.m. that day. According to her testimony at the hearing, she was instructed by the police to call them if she saw her assailant. During the evening of May 17, she saw the boyfriend at a neighborhood restaurant, the "Jerk Chicken." She

called the police and it was in response to that call that the arresting officers picked her up and began circling the neighborhood to look for her assailant, to no avail. However, they did spot defendant's car double parked in the vicinity of the Jerk Chicken. Just as defendant's car pulled away, according to the complainant, she informed the officers, "that's Dion['s] friend. *If he's around, then Dion should be around*" (emphasis supplied). It was this information that was the basis for the police action in following and then signaling defendant to stop his vehicle. The hearing court's undisturbed finding was: "believing that [defendant] *would* furnish information as to [the boyfriend-assailant's] whereabouts, [the officers] followed his car. They activated their turret light and car horn to stop defendant's car (emphasis supplied).

The foregoing facts establish the reasonableness of the limited seizure which occurred here, on any fair application of the balancing analysis mandated by the Supreme Court and our own case law. First, the governmental interest in stopping defendant's vehicle for information on the assailant's whereabouts was substantial. Even if we were to accept the majority's characterization of that interest as strictly limited to the "investigation and detection of past criminal conduct" (majority opn. at 754), undeniably, the past criminal conduct here was a violent felony, committed only some forty hours earlier, and the police were entitled to presume that the perpetrator remained in illegal possession of the deadly weapon used against the victim. *United States v Hensley (469 U.S. 221),* relied upon by the majority to minimize the governmental interest here, is actually directly instructive on the justification for the stop under the uncontested facts just described:

> Particularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible. The law enforcement interests at stake in these circumstances

> outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or on-going crimes *(id., at 229)*.

Moreover, as the Appellate Division recognized, there was more of a compelling governmental interest here than the mere detection of past criminal activity. The perpetrator was an armed and dangerous person. The crime he committed was not a random street assault, but arose out of a romantic relationship which had turned hostile and sufficiently perilous to the victim that her mother caused her to file a criminal complaint. The victim, following instructions from the police upon her prompt report of the crime the day before, reported seeing defendant in the neighborhood earlier that evening. These facts, notably the assailant's particularized personal hostility toward the victim and his use and continuing possession of a handgun, readily support a preventative governmental interest in the stop, in addition to the interest in detecting a past crime. In its repeated assertion that no ongoing crime was "afoot" here (majority opn. at 756; *see also id.*, at 754-755, 757-758), the majority pointedly ignores Dion Bloomfield's continued criminal possession of a deadly weapon. This illustrates the flaw in the majority's application of the balancing analysis required in a case of this kind.

Moreover, inquiring of defendant just as he left the area where the victim's assailant had been seen earlier in the evening promised more than just the possibility of locating the assailant at some future time. Since (according to what the complainant told the police) "if [defendant]'s around, then [her assailant] should be around", questioning the defendant would indeed likely disclose information on the assailant's *then* location, as found by both lower courts here. Thus, a degree of urgency was present in that the police justifiably believed that defendant would give them information on the assailant's immediate whereabouts. These governmental interests --

apprehension of a serious felony offender, prevention of further violence, seizure of an illegal handgun and the urgency of the need to obtain fresh rather than stale information on the perpetrator's whereabouts -- far exceeded the substantiality of the governmental interest in conducting the informational stop in *People v John BB.* "in the heavily burglarized area, in order to facilitate the concededly legitimate function of acquiring information regarding the recent burglaries" *(56 NY2d 482, 488, supra).*

The degree of intrusion on defendant's privacy interest was not high here. The stop occurred well after nightfall. The activation of turret lights and use of the patrol car's horn would appear to have been the least threatening way effectively to signal defendant to stop his vehicle, an inference confirmed by the hearing court's finding that defendant travelled an additional block thereafter before bringing his vehicle to a halt. The officers approached defendant's vehicle without drawing their service revolvers. They did not issue any direct order to defendant not to resume moving *(cf., People v May, 81 NY2d 725).* Nor did the seizure here begin to approach the level of intensity of that in *People v John BB. (supra)* where, as reported in the decision at the Appellate Division, the defendant's vehicle was surrounded by three troop cars at the side, front and rear *(see, People v John BB., 81 AD2d 188, 189).*

Given the urgency of gathering fresh information on the violent felon's then whereabouts as previously described, the record fully supports the suppression court's undisturbed finding that "unlike other cases where means less intrusive than a stop, such as continued observation, are available to the police in furtherance of an investigation [citations omitted], here the police officers had no alternative to the stop." The majority's finding to the contrary, that some unspecified less intrusive procedures were available to the police to attain their objective (majority opn. at 757), is not only beyond our powers in reviewing the findings of the lower courts, but in

our view is singularly inappropriate hindsight regulation of police conduct by appellate judges far removed from the realities of dynamic street situations that the police confront as events unfold *(see, People v De Bour, 40 NY2d 210, 225).*

Finally, in determining, contrary to the findings of the courts below, that the informational stop here was arbitrary and the result of "the unchecked discretion" (majority opn. at 758) of the police and, thus, was unreasonable, the majority not only once more exceeds this Court's factfinding powers but also commits an error of law. According to the majority, vehicular stops not based upon reasonable suspicion of an occupant's criminal activity are arbitrary and the result of the exercise of unconstrained discretion unless an extreme, immediate exigency exists to prevent a crime in process or the stop is pursuant to a nonarbitrary, nondiscriminatory uniform procedure of stopping vehicles for a legitimate informational purpose. There is no authority whatsoever which would support the majority's position that such an absolute exigency is a *sine qua non* for the validity of an informational vehicular stop, rather than just one of many factors to be considered in assessing the weight of the governmental interest served by the stop in the balancing process mandated by the decisions of our Court and the Supreme Court.

Likewise, neither our decisions nor those of the Supreme Court condemn as arbitrary and wholly discretionary all informational stops unless made pursuant to a uniform, standardized procedure, such as a border or DWI checkpoint. Indeed, the Supreme Court's holding in *Brown v Texas (443 U.S. 47, 51)* instructs otherwise:

> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field

> [citations omitted]. To this end, the Fourth Amendment requires *that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or* that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of the individual officers (emphasis supplied).

In the instant case, the record clearly demonstrates the existence of "specific, objective facts" justifying the police procedure employed to stop defendant, namely, (1) the police had probable cause to believe that the complainant's former boyfriend-assailant had committed a felonious assault, was armed and potentially dangerous; and (2) the police had direct information from someone having personal knowledge of the facts that defendant would likely be capable of disclosing the assailant's then whereabouts. Thus, far from being based on pure whim or caprice, the reliable information possessed by the police actually furnished them with a completely objective (not subjective) justification for the stop, i.e., the likelihood on the basis of independent information that questioning defendant at that time would lead to the prompt arrest of the complainant's dangerous assailant. This is in total contrast to the stop in *People v May (81 NY2d 726),* relied upon by the majority, where the only objective facts the police had to suspect anything were that the defendant and his female companion were parked at night in a high crime neighborhood and pulled away when the police approached. Moreover, the specific, objective factual justification for the stop of defendant here is far greater than merely "some articulable basis" (majority opn. at 753, 754), the majority's mischaracterization of the standard we have applied for this informational vehicular stop.

On the basis of the foregoing, the Appellate Division correctly found that the stopping of defendant's vehicle was not

arbitrary or based on whim or caprice. Rather, the police action here fully complied with the requirement of reasonableness articulated in *Delaware v Prouse (440 U.S. 648, 654)* "that the facts upon which an intrusion is based be capable of measurement against *'an objective standard,'* whether this be probable cause or a less stringent test." The majority's fear here is absolutely unjustified that upholding this measured, entirely reasonable and commendably decisive response to the direct, immediate information given by a victim of a violent assault, will somehow open "a pandora's box of pretextual police [informational] stops" (majority opn. at 759). As this case demonstrates, the objective, factual basis for an informational stop is fully capable of assessment in order to insure that the police are not acting from pure whim or caprice, no less than in the case of an investigative stop of a vehicle whose occupants are suspected of criminal activity. The majority's prophylactic restriction on completely reasonable and responsible police conduct here ironically grants elevated Fourth Amendment protection to occupants of a moving vehicle in which a citizen is traditionally held to have a diminished expectation of privacy *(see, People v Scott, 63 NY2d 518, 525, supra; United States v Martinez-Fuerte, 428 U.S. 543, 561).*

After legally stopping defendant's vehicle, the police were justified in using flashlights to illuminate the interior to insure their own safety, to seize the bag of marijuana they saw in plain view and then to place defendant under arrest.

Accordingly, we vote to affirm the order of the Appellate Division.

Order reversed, defendant's motion to suppress physical evidence granted and indictment dismissed. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Titone and Smith concur. Judge Levine dissents and votes to affirm in an opinion in which Judges Simons and Bellacosa concur.

Decided January 17, 1995.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CLIVE SPENCER, Appellant.

Second Department, October 4, 1993

SUMMARY

APPEAL from a judgment of the Supreme Court (Melvin Barasch, J.), rendered January 31, 1991 in Kings County, upon a jury verdict convicting defendant of criminal possession of a weapon in the third degree and criminal possession of marihuana in the fourth degree. The appeal brings up for review the denial, after a hearing (Albert D. Tomei, J.), of that branch of defendant's omnibus motion which was to suppress physical evidence.

APPEARANCES OF COUNSEL

Jay H. Schwitzman, Brooklyn, for appellant.

Charles J. Hynes, District Attorney of Kings County, Brooklyn *(Roseann B. MacKechnie, Anthea H. Bruffee* and *Bruce D. Austern* of counsel), for respondent.

OPINION OF THE COURT

SULLIVAN, J. P.

At issue here is when may the police stop a vehicle in order to request information.

On May 17, 1989, Kalima Alamin telephoned police regarding an alleged assault which she had previously suffered at the hands of her boyfriend, Dion Bloomfield, who had purportedly struck her in the mouth with a gun. At approximately 11:20 P.M. that night, two police officers in a patrol car picked up Alamin and drove her through a neighborhood frequented by Bloomfield in an attempt to find him. During their patrol, Alamin recognized and pointed out a vehicle belonging to the defendant. She informed the officers that the defendant was a

friend of Bloomfield and might know where he was. Accordingly, as found by the hearing court, the officers activated the turret lights of their patrol car and engaged their horn to pull the defendant's vehicle over. To ensure their safety, the officers approached the defendant's automobile from either side with their flashlights lit. Their guns were holstered, and they intended only to inquire of the defendant as to his knowledge regarding the whereabouts of Bloomfield. However, upon reaching the car, and with the flashlights illuminating the interior of the vehicle, one of the officers immediately observed a large clear plastic bag on the floor of the front passenger seat. The bag contained brown and green vegetable matter which the officer believed to be marihuana. He thereupon ordered the defendant and his female passenger out of the car. As the defendant alighted from the vehicle, the officer noticed the butt of a handgun protruding from under the driver's seat. The officer removed the weapon and the marihuana from the vehicle, and the defendant was placed under arrest after indicating that his female passenger had no connection to the items retrieved from the car.

It is the defendant's contention that the police action in ordering him to stop his vehicle constituted a seizure that was impermissible when measured by constitutional standards, and that this tainted the subsequent discovery and seizure of the marihuana and the handgun. The defendant relies on a narrow reading of certain portions of *People v Ingle* (36 NY2d 413), *People v Sobotker* (43 NY2d 559), and *People v Corcoran* (89 AD2d 696) to establish a bright line rule that would forbid the police from stopping an automobile driven by an identified and acknowledged friend of a suspect for the purpose of asking the driver if he knows the whereabouts of the suspect. We believe that this reliance is misplaced and that under the circumstances of this case, the police action in stopping the defendant's automobile was not a violation of his constitutional or common-law rights. We therefore affirm the conviction.

In one of the seminal cases in this area *(People v Cantor,* 36 NY2d 106, 112), it was said: "Street encounters between the patrolman and the average citizen bring into play the most subtle aspects of our constitutional guarantees. While the police should be accorded great latitude in dealing with those situations with which they are confronted it should not be at the expense of our most cherished and fundamental rights. To tolerate an abuse of the power to seize or arrest would be to abandon the law-abiding citizen to the police officer's whim or caprice—and this we must not do".

This concept was further refined and clarified in *People v De Bour* (40 NY2d 210). In *De Bour,* the defendant contended that, by stopping him as he was walking on the street at 12:15 A.M. and asking him what he was doing there and for identification, the police officers seized him within the meaning of the Fourth Amendment. Such a reading of *Cantor* was rejected. The Court of Appeals distinguished the conduct of the police in *Cantor* (three plainclothes officers surrounded the defendant with revolvers drawn and blocked his vehicle with their own) and *People v Ingle* (supra, at 418 [officers " 'accosted' " and " 'restrained' " a motorist for a " 'routine traffic check' " without any articulable reason]) from that in *De Bour* (the defendant was approached and questioned by two uniformed officers whose conduct bespoke no violent or forcible apprehension). The Court found that "[c]learly then, De Bour was not seized in the sense that Cantor and Ingle were" *(People v De Bour, supra,* at 217).

Even though the officers in *De Bour* had no articulable reasons that would justify his arrest or seizure, that did not prevent the officers from initiating an encounter with him, as long as the officers' conduct was not arbitrary or the product of a whim, and was reasonable: "The crucial factor is whether or not the police behavior can be characterized as reasonable which, in terms of accepted standards, requires a balancing of the interests involved in the police inquiry" *(People v De Bour, supra,* at 217).

Following a discussion of the companion case of *People v La Pene* (40 NY2d 210), the Court stated: "In evaluating the police action we must consider whether or not it was *justified in its inception* and whether or not it was *reasonably related in scope to the circumstances* which rendered its initiation permissible *(People v Cantor,* 36 NY2d 106, 111)" *(People v De Bour, supra,* at 222-223 [emphasis added]).

The Court of Appeals then set forth its now familiar four-tiered analysis of justifiable police conduct in street encounters. The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality. This is designed to prohibit police conduct that is purely arbitrary, based on a whim or hunch and not "reasonable", i.e., founded on reason.

The nature of the information that the police may seek under this first tier may be identification, destination, or reason for being in the area, that is sought in a brief, non-threatening encounter *(People v Hollman,* 79 NY2d 181, 190, 191). If and when the police questioning becomes extended, accusatory, and focuses upon the possible criminality of the person questioned, it has risen to the level of common-law inquiry that must be supported by founded suspicion that criminality is afoot *(People v De Bour, supra,* at 223; *People v Hollman, supra,* at 191-192).

There is no question but that the police officers in the case before us were operating on the first tier of activity as set forth in *De Bour* and *Hollman,* i.e., an approach to the defendant with a request for information based on an objective credible reason for that information. The officers were looking for Dion Bloomfield to arrest him for the felonious assault on Kalima Alamin. Ms. Alamin pointed out the defendant and told them he might know where Bloomfield was. This right to request information to enable police officers to perform their

law enforcement duties will "hinge on the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter" *(People v De Bour, supra,* at 219). In this case the information sought, the whereabouts of Bloomfield, would not adversely impact Spencer. It was not intended to harass Spencer, nor was it based on a whim or arbitrary decision of the officers. Ms. Alamin, the victim and former girlfriend of Bloomfield, told the officers that Spencer was a friend of Bloomfield and might know where he was. Since the officers had probable cause to arrest Bloomfield for a felony, they clearly had a valid reason for approaching Spencer with this inquiry.

While the defendant implicitly concedes that the officers would have had the right to seek this information from him if he was a pedestrian *(see, People v De Bour,* 40 NY2d 210, *supra; People v Hollman* 79 NY2d 181, *supra),* he contends that stopping his vehicle was a seizure subject to constitutional limitations *(People v Ingle,* 36 NY2d 413, 418, *supra; People v Sobotker,* 43 NY2d 559, 563, *supra),* and that such seizures are only permitted under the third tier of the *De Bour* analysis, that is, a forcible stop and detention of a person which is authorized only when the officer has reasonable suspicion that the person has committed, is committing or is about to commit a felony or misdemeanor (CPL 140.50 [1]; *People v De Bour, supra,* at 223). If the officer reasonably suspects his life is in danger, he may frisk the persons so detained (CPL 140.50 [3]). According to the defendant's contention, the only other permissible stop of an automobile is for a routine check to enforce automobile regulations *(People v Corcoran,* 89 AD2d 696, *supra).* This is an unduly restrictive interpretation of the precedents and does not accurately reflect the law.

In *People v John BB.* (56 NY2d 482, *cert denied,* 459 US 1010), the Court of Appeals examined a situation where police were stopping and questioning all persons found on

foot or in vehicles in a sparsely populated area that had been subject to a high number of burglaries. While recognizing that the stop of the automobile in which the defendant was riding was a limited seizure subject to constitutional limitations, the Court noted that the essential question is whether the stop of the vehicle and its occupants was an *unreasonable* seizure prohibited by the Constitution. "While this proscription generally forbids any unwarranted intrusion into the private affairs or conduct of any individual, we have noted that there is no absolute right to be free from all official inquisitorial interference however minimally intrusive" *(People v John BB., supra,* at 487; *see also, People v De Bour,* 40 NY2d 210, *supra).* At the same time, the Court refused to establish any bright line rule, insisting on a case-by-case examination of the reasonableness of the police conduct. This determination of *reasonableness* is to be based on a balancing of the State's interest in the inquiry with the interest of the individual in being free from governmental interference. Most importantly for our consideration herein, the Court stated: "But this does not mean that the broad range of factors relevant for the purpose of constitutional examination can never be analyzed in a manner which leads to the ultimate conclusion that the State may stop an automobile and question the occupants for legitimate reasons" *(People v John BB., supra,* at 487-488).

In affirming the denial of suppression, the Court of Appeals found that the nonarbitrary, nondiscriminatory, and uniform procedure utilized to stop vehicles was reasonable to obtain information concerning the recent burglaries. The Court further pointed out that, while not controlling, the absence of arbitrariness is a critical factor in determining the reasonableness of official investigative activity of an intrusive nature. Also to be considered was the fact that the stop of the subject vehicle was not undertaken with an intent to harass and was based on much more than whim, caprice, or idle curiosity *(People v John BB., supra,* at 488).

The application of the principles enunciated in *People v John BB. (supra)* to the facts of the case before us would indicate that the actions of the officers in stopping the defendant's vehicle were, under all of the circumstances, reasonable and proper. The information sought by the police, the whereabouts of the suspected felon Bloomfield, was properly within their law enforcement duties *(see, People v Hollman, supra,* at 189) and formed a legitimate basis for questioning the defendant *(see, People v John BB., supra,* at 488). Singling out the defendant for stop and questioning was not the result of a uniform procedure as was that of the officers in *John BB.,* but in light of the information they had, there was no need for a broad net approach. Clearly, the stop and questioning of the defendant was not arbitrary. It was not based on mere whim, caprice, or idle curiosity. It was based on information supplied by the victim of the crime who knew the perpetrator, Bloomfield; knew the defendant; knew that the defendant knew Bloomfield, and believed that the defendant would know where Bloomfield was. It was proper and legitimate investigative technique for the officers to seek to question the defendant regarding Bloomfield's whereabouts. Given the nature of the crimes involved, felonious assault and criminal possession of a weapon, the State's interest in learning of Bloomfield's whereabouts so as to effect an arrest more than counterbalanced the defendant's interest in being free from governmental interference.

There is a marked and critical distinction between this case and those in which the person whose vehicle is stopped is the target of the investigative questioning *(see, People v John BB., supra,* at 489; *People v Sobotker, supra; People v Ingle, supra; People v Harrison,* 57 NY2d 470; *People v May,* 81 NY2d 725; *People v Voliton,* 190 AD2d 764). Such a situation implicates the third tier of the *De Bour* analysis and requires reasonable suspicion to justify a vehicle stop. We are dealing in this case, as we stated earlier, with a simple request for information, the first tier of the *De Bour* analysis, which is

governed by the standards set forth in *People v John BB.* *(supra; see also, People v Holstein,* 154 AD2d 905).

Furthermore, the use of flashlights by the officers to illuminate the interior of the vehicle did not constitute an unreasonable intrusion, and the officers were entitled to seize the weapon and marihuana which were in plain view *(see, People v Baldanza,* 138 AD2d 722; *People v Robinson,* 115 AD2d 411).

Accordingly, the judgment appealed from is affirmed.

EIBER, PIZZUTO and JOY, JJ., concur.

Ordered that the judgment is affirmed.

MEMORANDUM

SUPREME COURT KINGS COUNTY

PEOPLE OF THE STATE OF NEW YORK	)	(CRIMINAL TERM, PART 31)
	)	By TOMEI, J.
vs.	)	Dated October 9, 1990
CLIVE SPENCER	)	Indictment No. 6901/89

Clive Spencer, charged with criminal possession of a weapon in the third degree and criminal possession of marijuana in the fourth degree, moves to suppress the physical evidence which forms the basis of the charges, on the ground that its seizure violated his constitutional rights. The court conducted a *Mapp/Dunaway* hearing on September 14 and 17, 1990. Testifying for the People were Police Officers Edward Alonge and Donald Concecao, both of the 67th precinct. Testifying for the defendant was Ms. Kalima Alamin. Based on the testimony adduced at the hearing, the court makes the following findings of fact and conclusions of law.

Findings of Fact

In the evening of May 17, 1989, Edward Alonge, a police officer with five years' experience, and Donald Concecao, a police officer with over six years' experience, were on routine patrol in a marked radio car. The officers received a radio report to the effect that the day before a female had been assaulted with a gun by her former boyfriend, Dion Bloomfield. At approximately 11:20 p.m. the officers picked up the 19-year-old complainant, Ms. Alamin, at Nostrand Avenue and Linden Boulevard. They proceeded to drive around the vicinity searching for Mr. Bloomfield. As they drove past the Turntable Lounge located on Rogers Avenue between Martense Street and Linden Boulevard, Ms. Alamin remarked that a man, defendant herein, who was seated behind the

wheel of a double-parked car, was a friend of Mr. Bloomfield and that Mr. Bloomfield might be close by. By this time defendant's vehicle had started down Rogers Avenue and turned left onto Linden Boulevard. Believing that Mr. Spencer would furnish information as to Bloomfield's whereabouts, Alonge and Concecao followed his car. They activated their turret light and car horn to stop defendant's car. One block later, on the corner of Bedford Avenue and Linden Boulevard, defendant brought his vehicle to a halt. Although Ms. Alamin asked the officers not to involve Mr. Spencer for fear of retribution, the officers persisted; they advised Ms. Alamin to conceal herself by crouching down out of sight in the rear of the patrol car.

Officer Alonge approached defendant's vehicle on the driver's side while Officer Concecao proceeded to the passenger's side. Neither had their weapons drawn but both carried flashlights for safety reasons. As they neared, they noticed a female sitting next to defendant. The officers shone their flashlight around the interior of the vehicle. When the floor of the automobile beneath the front passenger seat was illuminated, they observed a clear plastic bag containing a large amount of greenish brown vegetable matter that appeared to be marijuana, at the feet of the female passenger. Upon discovering the plastic bag, Officer Alonge asked Mr. Spencer and the female to exit the vehicle and step to the rear. As defendant informed them that the female had nothing to do with the alleged marijuana, the officers allowed her to leave.

Once Mr. Spencer was out of the vehicle Officer Alonge observed the butt of a revolver on the floor of the car protruding from beneath the driver's seat. The gun was loaded with five rounds. The officers placed defendant in custody and, after a back-up unit arrived, transported him to the 67th precinct.

Conclusions of Law

On this *Mapp/Dunaway* hearing the defendant has the burden of proving the illegality of the search by a preponderance of the evidence. (*People v Berrios,* 28 NY2d 361.) The People have the burden of going forward to show the legality of the police conduct. (*People v Malinsky,* 15 NY2d 86.) To determine whether the People have met their burden the court "must consider whether or not the police action was justified at its inception and whether or not it was reasonably related in scope to the circumstance which rendered its initiation permissible." (*People v DeBour & La Pene,* 40 NY2d 210, 222.)

In *People v DeBour, supra,* the Court of Appeals recognized that even in the absence of any indication of criminal activity the police may approach a private citizen for the purpose of requesting information, provided there is some objective credible reason for the interference. The facts which were elicited at the hearing establish that the information possessed by the police at the initiation of their encounter with defendant justified only this minimal degree of interference: the officers could recall no information that would suggest wrongdoing by defendant. Their only purpose in approaching Spencer was to locate Dion Bloomfield. However, this purpose constituted an "articulable reason" to approach defendant, since the police were obligated as part of their law enforcement duties to investigate Alamin's complaint.

Having concluded that the police could legitimately approach defendant, the court must next consider whether the ensuing stop of defendant's automobile was reasonably related in scope to the circumstance which rendered its initiation permissible.

Ordinarily, the police are not authorized to stop a vehicle moving on the highway in the absence of circumstances suggesting criminality on the part of the occupants. (*People v Sobotker,* 43 NY2d 559.) However, in the matter at bar, at the

time the police resolved to exercise their right to request information, defendant's vehicle was in motion. Under these circumstances, common sense demands that they be permitted to stop it.

In this regard the stop at bar is similar to the stop in *People v DeBour, supra,* where the police approached defendant, who was walking, to request information even though they had no indication of criminal activity on his part. Rejecting defendant's argument that he was seized because he was caused to stand still, the Court of Appeals found the police conduct to be reasonable because it was devoid of harassment or intimidation, lasted only a few minutes and did not subject defendant to a loss of dignity. Unlike other cases where means less intrusive than a stop, such as continued observation, are available to the police in furtherance of an investigation, (see, for example, *People v Giles,* 137 AD2d [1st Dept 1988]; *People v Ferraciano,* 135 AD2d 49 [2d Dept 1987]), here the police officers had no alternative to the stop. Like the officers in *DeBour,* the officers employed no display of force in their approach.

Since the police officers could legitimately approach defendant's vehicle, their use of the flashlight to illuminate the interior of the car does not constitute an unreasonable intrusion. (*People v Baldanza,* 138 AD2d 722, lv denied 72 NY2d 856.) "... Shining a flashlight to illuminate what would have been in plain view in daylight did not involve an unreasonable intrusion." (*People v Robinson,* 115 AD2d 411, 413 [1st Dept 1985]). Accordingly, the marijuana which became visible once the area beneath the woman's feet was lighted, was properly seized.

Beginning with the events following the officers' approach to defendant's car, the testimony of the police officers and the testimony of defense witness Kalima Alamin diverged sharply. The court found several weaknesses in the testimony

of the police officers, most notably their failure to reveal at any time prior to the hearing the statement allegedly made by the defendant at the time the marijuana was recovered, to the effect that his female companion was not responsible for the drugs. However, Ms. Alamin's testimony was even more troublesome. She testified that she implored the police officers not to involve Mr. Spencer because she was afraid that he would "get her" if she got the cops on him. She also testified on cross-examination that defendant telephoned her and asked her to come and testify on her behalf. These facts strongly suggest that Ms. Alamin was intimidated by defendant and that her testimony was influenced accordingly. Further, Ms. Alamin was not accurate in certain portions of her testimony. For example, she placed defendant's arrest at approximately 8:00 in the evening on May 17, 1989. Finally, according to her testimony, Ms. Alamin made her observations while ducking down in the rear seat of the patrol car. Although she testified that her head was facing toward the back window and that she was slanted down into the seat, she insisted that she could see everything that occurred through the front window of the police car. Due to these problems which bear directly on Ms. Alamin's credibility the court generally credited the police officers' version of the facts.

When the police officers discovered the marijuana in the car, they had probable cause to arrest defendant and, consequently, could lawfully order him out of the automobile. (*Pennsylvania v Mimms,* 434 US 106, 110.) Since, once defendant was out of the car the weapon appeared in plain view, it too was lawfully seized.

Given that the police action was reasonably related at every stage to the degree of knowledge and credible belief possessed by the police officers, the court concludes that the defendant has failed to sustain his burden of proof on the hearing. Therefore, the motion to suppress is denied.

The foregoing constitutes the decision and order of the court.

/s/ Tomei
J.S.C.